United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7021

ORIGINAL

In The

United States Court of Appeals

For The Second Circuit

ROBERT J. FINE,

Plaintiff-Appellant,

- against -

THE CITY OF NEW YORK, FRANK KLEIN, MARVYN KORNBERG, ESQ., ALBERT GAUDELLI, ESQ., and HERBERT KAHN, ESQ.,

Defendants-Appellees,

- and -

PTL. ANTHONY SALADINO, ESTATE OF ROBERT L. RADTKE, DET. MICHAEL SASSAMAN, PTL. "JOHN" STANLEY, PTL. "JOHN" DWYER, PTL. "JOHN" FISCHER, SGT. "JOHN" MURRAY, DAVID FAULKNER and MRS. DOLORES FAULKNER,

Defendants.

BRIEF FOR DEFENDANT-APPELLEE, MARVYN KORNBERG

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THE ISSUE

WHETHER A COMPLAINT AGAINST A PRIVATE ATTORNEY STATES A CLAIM UPON WHICH FEDERAL RELIEF CAN BE GRANTED, THAT CHARGES THAT APPELLANT SUFFERED DAMAGES FROM A POLICE INVESTIGATION INITIATED AS A RESULT OF INFORMATION FURNISHED BY THE CLIENT OF THE PRIVATE ATTORNEY?

PRELIMINARY STATEMENT

This is an appeal from an order entered on the 22nd day of November, 1974, in the United States District Court, Southern District of New York (Brieant, J.), dismissing the complaint herein against appellee KORNBERG, hereinafter referred to as KORNBERG, as failing to set forth a claim on which relief can be granted. Subsequent untimely motions for reargument resulted in an adherence to the decision.

STATEMENT OF FACTS

Plaintiff apparently a homosexual, with a preference for young boys, was arrested the 7th day of March, 1972 and charged with the crimes of sodomy, endangering the welfare of a child, promoting gambling, possession of a gambling records in the second degree and possession of weapons and dangerous instruments and applicances. During the course of the investigation, police officers searched the apartment of appellant, discovering forty six photographs of nude obys in various sexually degenerate poses, depicting some with soda bottles in the anus, some with bullets in the anus and one depicting a boy with a gun at his head, forty three 25 caliber bullets

forty-nine 32 caliber bullets, and twelve 38 caliber bullets. (P. 28a*). The investigation began on March 5th, when Patrolman Kiselewuski of the 109th Precinct was alerted that a boy, who turned out to be defendant DAVID FAULKNER, age sixteen, was trying to sell a gun in a Queens bar. The patrolman investigated and found the youth in possession of a pistol. He took him to the 109th Precinct for questioning. It developed that young Faulkner was a resident of Bayonne, New Jersey, who had met appellant in the Time Square area and then went to live in appellant's Flushing apartment to carry out a sex liaison. The boy told the police that the gun in question belonged to appellant, a mature man, and admitted that he was involved in a homosexual relationship with appellant. This information triggered an investigation. (P. 37a)

Several police officers accompanied the boy to appellant's apartment. They entered the unlocked door and made a search of the premises. (P. 37a) At an examination before trial, Detective Michael Sassaman described what was seen as they entered the apartment:

> "I would call it a shambles. There were two dogs, as I said, which were there. To me, it appeared as if they had the run of the living room and that is where they went, they lived in the living room, they shit in the living room, and they pissed in the living room,
> "The floor was almost a sea of dog droppings. I would call the condition of the place very bad, dirty unkept." (P. 97a-98a)

* Page numbers refer to appellant's appendix

One of the photographs seized, depicted defendant David Faulkner nude and was material and necessary to supply the element of corroboration, at that time necessary under New York Law to make out a prima facie case for the sex charges growing out of appellant's liaison with defendant David Faulkner. However, following a hearing to suppress the evidence seized at his apartment, Queens County Supreme Court Justice Brennan on the 17th day of January, 1974 granted the application to suppress on grounds that the search was illegally conducted in the absence of appellant, without a search warrant, but clearly ruling that there was probable cause to conduct the investigation from the information learned from defendant David Faulkner:

> "In the case before us, the police certainly had ample cause for investigation. A crime had been committed; a gun was found; an investigation was in order. Once the complainant (Faulkner) indicated a link with the defendant, it was certainly reasonable for them to go to his apartment and interrogate him." (P. 37a-40a)

When the search was made by the police officers, who seized the evidence ultimately suppressed, they were accompanied by the complainant, defendant David Faulkner and appellee KORNBERG, an attorney present to represent the interests of his client, defendant DAVID FAULKNER. (P. 37a)

Appellant commenced this action against the City of New York, several police officers, two assistant district attorneys, the complainant David Faulkner, his mother Dolores Faulkner and appellees Frank Klein and KORNBERG,

private attorneys, the former having represented appellant and the latter, the complainant. (P. 7a) Federal jurisdiction was invoked pursuant to 42 U. S. D. 1983, on grounds that all of the defendants were acting under color of State law at the time of the search. (P. 7a)

The first cause of action charges that on the 5th day of March, 1972, appellee KORNBERG, defendant FAULKNER and some unnamed defendant police officers forced their way into appellant's apartment and made a search of the premises ".....and unlawfully destroyed, damaged and took possession of (appellant's) properly, that on the 6th, 7th and other days in March of 1972, certain of the defendants not named committed similar acts. The complaint charges that these acts were committed by police officers "in their" official "capacities ..... with the knowledge and consent of the said defendants KAULKNER and KORNBERG." The complaint further alleges that the searches particularized were illegally conducted without a search warrant in violation of appellant's Constitutional rights secured by the Fourteenth Amendment and that subsequently, "defendants instituted criminal proceedings against (appellant) on charges of sodomy in the third degree, endangering the welfare of a child, promoting gambling, possession of gambling records in the second degree and possession of weapons and dangerous instruments and appliances as a misdemeanor, "all of which "were dismissed in the Supreme Court, Criminal Term, Queens County." (P. 10a-11a) Appellant alleges that as a

result of the acts charged, he suffered damages, detailing his special damages, including $30,000.00 for legal expenses and counsel fees." (P. 7a-15a).

The second cause of action charges defendants with conspiring to deprive appellant of his Constitutional rights, causing him, inter alia, "to be treated as a separate class of citizen not entitled to the benefits of search warrants" and to be "subjected to cruel and inhuman punishment," as a result of which, appellant suffered damages. (P. 15a-16a)

The third cause of action charges that "defendants converted to their own use $3,800.00 in United States currency, a coin collection, furniture, photo albums, jewelry, 20,000 Pesos in Colombian currency, two dogs, a taxicab, clothing and other personal property all of a total value in excess of $90,000.00, all being the property of plaintiff." (P. 16a-17a)

The fourth cause of action charges that "soon after March 5, 1972, some of the defendants conspired to extort money from (appellant) by withholding (appellant's) taxicab from (appellant's) possession unless (appellant) paid money to said defendants" and appellant "did in fact pay the defendant KLEIN in excess of $500.00 as a result of this extortion." (P. 17a)

The fifth cause of action charges that "after March 7, 1972, the defendant MRS. FAULKNER conspired with certain of the other defendants in an attempt to have the plaintiff

pay money to them in return for their assistance in obtaining the dropping of the criminal charges" and "on or about April 11, 1972, plaintiff did in fact pay the defendant KLEIN $550.00 to obtain the release of plaintiff's taxicab from police custody." (P. 17a-18a)

The sixth cause of action charges that "on or about March 7, 1972, defendant SALADINO and a police sergeant in the 109th Precinct assaulted, slandered, harassed and abused (appellant) on the premises of the 109th Precinct" and "the police sergeant . . . told Mildred Moriches, a woman who worked for (appellant), that (appellant) was a pervert who liked little boys, that she should keep her grandchildren away from (appellant) and that she should be more careful of who she works for." (P. 18a)

The seventh cause of action charges that appellant paid defendant KLEIN for legal services which he failed to render or "rendered in a negligent, fraudulent and illegal manner," as a result of which "breach of contract, fraud, negligence and criminal acts in regard to this matter, (appellant) was required to expend funds in excess of $30,000.00 in additional legal fees," without revealing to whom he paid so generous a fee. (P. 19a)

Appellee KORNBERG moved to dismiss the complaint, pursuant to Rule 12 of the Federal Rules of Civil Procedure, "as failing to state a claim upon which relief can be granted." (P. 34a-35a)

Judge Brieant granted the motion, and dismissed the complaint as to appellee KORNBERG, writing, as follows:

> "Movant Kornberg, a private attorney, who represented the complainant Faulkner in the same criminal proceeding, is charged with having notice of and having consented to the unlawful acts of police officers in searching (appellant's) apartment.
> "Insofar as concerns defendant Kornberg, it appears from the face of the complaint that he was acting at all times in a private capacity as attorney for Faulkner. There is no allegation that he acted under color of State law, nor could there be. Certain other allegations against him are at most common law torts, and do not rise to the level of acts prohibited by the aforementioned statute." (P. 60a)

Appellant filed notice of appeal, but then made several motions for reargument, before finally perfecting the appeal. (P. 122a-123a)

POINT ONE

THE COMPLAINT FAILS TO STATE A CLAIM COGNIZABLE AGAINST APPELLEE KORNBERG, SINCE IT PLEADS THAT HE WAS ACTING AS A PRIVATE ATTORNEY, NOT UNDER COLOR OF STATE LAW, AND THEREFORE, FEDERAL COURT WAS WITHOUT JURISDICTION TO ENTERTAIN THE COMPLAINT AGAINST HIM PURSUANT TO 42 U.S.C. 1983.

The complaint reveals that appellee KORNBERG was acting as a private attorney for defendant KAULKNER, not under color of State law and so, federal court was without jurisdiction to entertain a cuase of action against him, brought pursuant to 42 U.S.C. 1983.

Defendant David Faulkner, a sixteen year old youth, was arrested for illegal possession of a firearm. During the course of police interrogation, he revealed that he had taken

the weapon from the apartment of appellant, with whom he was living and having a homosexual affair. This information mobilized the police into action and precipitated the search of appellant's apartment, albeit in his absence. Although State Supreme Court Justice William G. Brennan suppressed the evidence seized because of police failure to secure a search warrant which included photographs of nude young boys, many with soda bottles and bullets in their anus and which the prosecutor relief upon to corroborate the sex charge against appellant, the Judge nevertheless wrote in his opinion:

> "In the case before us, the police certainly had ample cause for investigation. A crime had been committed; a gun was found; an investigation was in order. Once the complainant indicated a link with the defendant, it was reasonable for them to go to his apartment and interrogate him."

Defendant David Faulkner was the complainant. He certainly was not acing under color of law. "It cannot seriously be contended that every time a court clerk, at the request of a private person initiates a civil action against another or a criminal summons is issued on the complaint of a private person, that private person acts under color of law for Fourteenth Amendment purposes, or that the State designates that private person, an agent of the State, for the purpose of carrying out a State function." Mullarkey v. Borglum, 323 F. Supp. 1218 (S.D.N.Y., 1970).

Appellee KORNBERG accompanied his client, as his private attorney, not in any other capacity. "An attorney's status as an officer of the court does not make him an officer of the state or of a governmental subdivision thereof. He is just another private individual for the purposes of Section 1938, and a professional act by him could not be considered an act done under color of State authority." Kregger v. Posner, 248 F. Supp. 804 (D.C. Mich., 1966) In Kregger, as in the case at bar, a private lawyer was charged with the commission of a tort, albeit, in that case, with swindling his client. The court held that even were the allegation true, since the lawyer was not cloaked by the State with authority to act on its behalf, there was no federal jurisdiction to entertain an action brought pursuant to 42 U.S.C. 1983. The remedy for the complainant was an action in State court for common law tort, the same remedy available for appellant in the case at bar.

In Dreyer v. Jalet, 349 F. Supp. 452 (D.C. Tex., 1972) prisoners brought an action against a lawyer for an injunction to prohibit her from entering the prison, alleging that her purpose was to instigate other prisoners to riot, with attendant danger to the petitioning prisoners. In holding that the attorney, irrespective of any encroachment by her upon the Constitutional rights of the petitioning prisoners, was not acting under color of law and therefore, a proceeding under 42 U.S.C. 1983 would not lie: "The mere fact that a person holds a license to practice law issued by a State does

not render that person's actions those of the state."

The cases are legion that "lawyers who are not also parties in interest and are engaged in private litigation on behalf of clients do not act under color of state law within the meaning of 42 U.S.C. 1983. . . . It may seem anomalous that an attorney, trained in the law, does not act "under color of law" when he participates in unconstitutional judicial procedures which damage another, while, at the same time, his client is chargeable with conduct under color of law, but, on reflexion, the reason for the distinction is clear. Absent a direct interest of the attorney in the litigation, it is only the client who stands to profit from procedures in deprivation of another's civil rights, and it is appropriate that he should be held, in a proper case, to respond in damages. An attorney acting only in a professional capacity cannot be held to judge at his peril with respect to the decision of difficult questions which divide the courts and provoke debate among legal scholars." Turnheim v. Bowman, 366 F. Supp. 1395 (D.C. Nev., 1973). In that case, it was held that an attorney could not be called upon to answer pursuant to 42 U.S.D. 1983 for abuse of confession of judgment proceedings, even assuming arguendo, that under the facts of that case, the client could be called upon to respond under the Civil Rights Statute.

"Lawyers who are not also parties in interest and are engaged in private litigation on behalf of clients do

not act under color of state law within the meaning of 42 U.S. C. 1983." Jones v. Jones, 410 F.2d 365 (7th Cir. 1969) It is submitted that defendant David Faulkner, the complainant in this case, f ishing information to the police of the criminal activities of appellant, acted as a private citizen, not under color of State law. "Making representations to a state official, even in a report required by law, is not acting under color of law because it does not purport to be done on behalf of the State." Schatte v. International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators, 182 F.2d 158 (9th Circ., 1950) The fact that defendant David Faulkner accompanied police officers to identify the apartment where appellant committed acts of child abuse, does not change his role from that of a private citizen. However, assuming arguendo that defendant David Faulkner had acted under color of law, appellant KORNBERG, in his role of a private attorney did not.

It is not suggested that it is impossible for a private citizen to be cast in responsibility under 42 U.S.C. 1983 for acting in concert with State officials, but the "test of color of law can rarely be satisfied in the case of anyone other than a State official." Montanez v. Colegio de Tecnicos de Refrigeracion y Aire Acondicionado de Puerto Rico, 343 F. Supp. 890 (D.C.P.R., 1962). But what is contended is that a private citizen cannot be responsible for the official acts of a police officer, where the private citizen merely reports a

crime a cooperates with the police in the apprehension of the wrongdoer. The complaint in the case at bar charges that the police committed "acts. . . . with the knowledge and consent of the said defendants Faulkner and Kornberg." This is not sufficient to hold these defendants liable for the acts of the police officers, even if they are later found to have exceeded Fourth Amendment limitations. In Adickes v. Kress & Co., 398 U.S. 144, 90 S. Ct. 1598, 26 L.Ed.2d 142 (1970), the Supreme Court cast a private department store in liability under the Civil Rights law for racial discrimination, since it was practiced under State custom and usage to carry out the official policy of discrimination. However, the Court wrote: "The terms of 1983 make plain two elements that are necessary for recovery. First, the plaintiff must prove that the defendant has deprived him of a right secured by the "Constitution and laws" of the United States. Second, the plaintiff must how that the defendant deprived him of this . . . constitutional right "under color of any statute, ordinance, regulation, custom or usage of any State or Territory. This second element requires that the plaintiff show that the defendant acted "under color of law" . . . ." In Kress, it was the private entity that acted as a State instrumentality to perpetuate a state policy of discrimination. The action was taken by Kress under color of State custom. Appellant has not pleaded any State "custom or usage" to deprive persons of their Fourth Amendment rights. Therefore, whatever it is alleged that

appellee KORNBERG did, it was as a private attorney.

In United States, v. Price, 383 U.S. 787, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1966), an indictment was upheld against private persons on "an allegation of official, state participation in murder, accomplished by and through its officers with the participation of others. It is an allegation that the State, without the semblance of due process of law as required by the Fourteenth Amendment, used its sovereign power and office to release the victims from jail, so that they were not charged and tried as required by law, but instead could be intercepted and killed. If the Fourteenth Amendment forbids denial of counsel, it clearly denounces denial of any trial at all." Time and time again, courts have held that "federal jurisdiction under 42 U.S.C. 1983 does not extend to all controveries between individual citizens, but only to deprivations of constitutional rights arising from the actions of pers-ns acting under color of state law. . . . Since Esveroff, Reen and Provident were not acting under color of state law, jurisdiction under 1983 is not properly invoked." Palermo v. Rockefeller, 323 F. Supp. 478 (S.D.N.Y., 1971)

What appellant has done in his complaint is lump together public officials who do not enjoy judicial immunity for their acts, with public officials who do and private citizens, and seek to thereby cast the latter two categories in liability, by a pleading that sufficiently states a federal cause of action against the former. Most criminal proceedings

are commenced on complaint of a private person. This does not work to render such persons liable for official acts carried out by the officers in charge of the case, merely because the complainant has "knowledge" of them, or even "consents" to their execution. There is even less argument for an effort to cast a private attorney representing the complainant in liability.

This does not mean that appellant is without remedy. It is not contended that appellee KORNBERG is immune for any tort he may have committed. It would seem that the allegations in the complaint are not directed against appellee KORNBERG. The third cause of action charges the conversion of appellant's money and property, without any evidentiary fact that appellee KORNBERG did it nor is appellee KORNBERG identified among the "some of the defendants" who "conspired to extort money from plaintiff," as pleaded in the fourth and fifth claims. Nor is he identified as the person who committed assault or slander against appellant, as pleaded in the sixth claim. How he can be possibly cast in responsibility for the alleged malpractice of appellee FRANK KLEIN, appellant's retained counsel, defies the imagination. So does appellant's rationale for bringing this claim under authority of the Civil Rights Act.

However, assuming arguendo, that appellant can plead tortious liability of appellee KORNBERG for damages to his reputation and property, his remedy is to bring an action in State court for damages for common law tort. The Civil

Rights Act was not promulgated to open federal courts to every claim of malicious prosecution and false imprisonment. In all criminal prosecutions, State officials have a hand in the proceedings. Yet, that does not work to transfer jurisdiction of resulting lawsuits against private citizens to federal courts. It certainly was not the intent of Congress to produce so bizarre a result in promulgating the Civil Rights Act. Because a party might plead a cause of action against State officials that will survive a motion to dismiss, does not mean that a joinder therein of private persons will also survive such motion.

CONCLUSION

THE ORDERS OF THE COURT BELOW SHOULD BE AFFIRMED.

Respectfully submitted,

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A 201 Affidavit of Service by Mail — LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Index No.

ROBERT J. FINE,

Plaintiff-Appellant,

- against -

THE CITY OF NEW YORK, et al.,

Defendants-Appellees.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Eugene L. St. Louis *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1235 Plane Street, Union, N.J. 07083

That on the 15th *day of* October *19*75*, deponent served the annexed* Reply Brief

upon Frank Klein *attorney(s) for*

Pro se *in this action, at* 42-15 43d Ave, Long Island City, N.Y.

the address designated by said attorney(s) for that purpose by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.

Sworn to before me, this 15th
day of October *19* 75

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

Eugene L. St. Louis

Print name beneath signature

EUGENE L. ST. LOUIS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ROBERT J. FINE,

Plaintiff-Appellant,

- against -

THE CITY OF NEW YORK, et al.,

Defendants-Appellees.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, James A. Steele *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 310 W. 146th St., New York, N.Y.

That on the 15th *day of* October *19* 75 *at* 1) Dan Brecher
230 Park Ave, N.Y., N.Y.
2) W. Bernard Richland
Municipal Bldg, N.Y., N.Y.
3) Louis J. Lefkowitz
2 World Trade Center, N.Y., N.Y.

deponent served the annexed upon the Attorneys *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,*

Sworn to before me, this 15th
day of October *19* 75

James A. Steele
JAMES A. STEELE

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977